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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE W. SEIBEL, individually and as a police officer of the City of Chicago Police Department,

Petitioner,

vs.

N. W. WHITLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state court finding of probable cause, at a preliminary hearing, collaterally estops a Section 1983 action, based on the arresting officer's failure to investigate, in a reasonable fashion, a plausible alibi and the officer's misrepresentations to the prosecuting authorities that he checked the alibi and found it to be false, where there was no full and fair opportunity to litigate the Section 1983 suit at the preliminary hearing.

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STATEMENT OF THE CASE

The petitioner's recitation of the facts of the case totally ignores the evidence presented to the jury to such an extent that the respondent is compelled to offer the following statement.[1]

[1] At the trial, the respondent called fourteen (14) witnesses and the petitioner one (1), covering approximately 800 pages of evidence. Since an adequate resolution of the petition for writ of certiorari requires an analysis of the evidence below, the respondent has requested the Clerk of the Seventh Circuit Court of Appeals to certify and transmit to this Court parts of the record below, which contains the evidence presented, in accordance with Rule 19 of the Rules of the Supreme Court of the United States.

The Seventh Circuit's opinion recites that the facts that underlie the respondent's lawsuit are also set forth in an earlier Seventh Circuit opinion: *Whitley* v. *Seibel*, 613 F. 2d 682 (7th Cir. 1980)(Whitley I).

The respondent was arrested and charged with crimes for which he had a complete alibi defense.[2]

When arrested on October 7, 1974, for a minor traffic charge and taken to the station house, the victims of an armed robbery and sexual assault said that the respondent was their assailant, although they had previously identified the picture of another man as the offender. On October 7, 1974, while in custody, the respondent gave the petitioner a business card of an employee (Catherine Ellenbecker) of an insurance company where the respondent was on the date and time of the crime. The respondent advised the petitioner that he was there to pick up a check in settlement of an insurance claim. The respondent also advised petitioner of the name and address of his employer where he had cashed the settlement check. An assistant state's attorney reviewed this evidence, but declined to authorize the respondent's arrest until petitioner checked out the respondent's alibi and the conflicting identification could be resolved.[3]

The next day, October 8, 1974, the petitioner prepared a police report and stated therein that he had "... found that the offender (respondent) was not in the location claimed and, therefore, had no alibi." The petitioner admitted that he never contacted the insurance company or even conversed with the above-named employees of said company. (T. 236-37)

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[2] The testimony of two employees of Liberty Mutual Insurance Company, Des Plaines, IL., namely Robert J. Devlin and Catherine Ellenbecker, conclusively established that respondent was in their offices on the date and time of the crimes for which the respondent was arrested and prosecuted. (T. 361, 376) Furthermore, Seibel failed to advise the prosecutors or include in any of his reports that Denise Broom corroborated the respondent's alibi on the night of October 7, 1974, in the police station. (T. 211, 213).

[3] Assistant State's Attorney Edward Hansen also testified that the petitioner never showed him the original police report (case report) which conflicted with the victims' recitation of the events. (T. 100) Petitioner also told this witness that the victims had positively identified a photograph of another person (Ronald Wells) as their offender (T. 105), and due to this fact, he advised Seibel to try and correct this problem by further identification procedures. (T. 105).

The petitioner arrested the respondent on October 14, 1974, and thereafter sought retroactive authorization for the arrest from an assistant state's attorney. (613 F. 2d at 684; T. 267) In doing so, the petitioner did not advise the assistant state's attorney of the alibi, but only that the prior assistant state's attorney advised petitioner to resolve the conflicting identification prior to the arrest. The petitioner told this second assistant state's attorney on October 14, 1974 (the date of the arrest) that the identification question had been resolved when, in fact, it had not.[4]

On October 14, 1974, the petitioner prepared a second police report and, in part, it stated that he was "... able to establish that Whitley was not where he had claimed at the time of the occurrence." (Petitioner's Appendix A, p. 6a, footnote 5.)

The preliminary hearing was held on November 14, 1974, before the state court judge. At the hearing, the petitioner told a third assistant state's attorney that the respondent's alibi had been determined to be false.[5]

When arrested, the respondent's bond was Ten Thousand ($10,000.00) Dollars, but on October 15, 1974, at the respondent's bond hearing, the bond was raised to Twenty-Five Thousand ($25,000.00) Dollars. (Petitioner's Appendix A, p. 3a.)

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[4] Seibel advised this prosecutor that the identification problem had been cured by the respondent's traffic arrest. However, respondent's traffic arrest occurred prior to the former prosecutor's (Hansen) order to correct the identification problem, and not subsequently as prosecutor Bloomquist was led to believe. (T. 147-161).

[5] The third prosecutor, Timothy Lee, also testified that Seibel told him there was no original case report on this matter when, in fact, there was. (T. 417, 418) Mr. Lee further testified about the practice in the preliminary court in Cook County, IL. during this period of time. (T. 426-456).

Two weeks prior to the preliminary hearing, the respondent's family retained an attorney who was unable to confirm the alibi by the time of the preliminary hearing on November 14, 1974, but subsequent to this hearing continued his efforts to so confirm the alibi.[6]

An Illinois preliminary hearing is a relatively summary procedure, designed only to reach an interim decision of bringing a defendant to trial. At that time, an accused had no right to discover an officer's supplemental reports, for example, petitioner's reports of October 7, 1974, and October 14, 1974. The preliminary hearing could be eliminated entirely, and the prosecution could take the case directly to the grand jury.[7]

Concerning the conduct of a preliminary hearing in Cook County, Illinois, the jury heard from the assistant state's attorney (Timothy Lee) who presented the state's case, Judge Wayne Olson[8] who presided at the hearing, Steven J. Bernstein, who defended the respondent at the hearing, and assistant public defender Kent Brody,[9] who had participated in approximately five hundred (500) preliminary hearings in Judge Wayne Olson's courtroom.

At the conclusion of the preliminary hearing, the judge found probable cause and the respondent was bound over to the grand jury, which later indicted him for the crimes.

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[6] Testimony of Attorney Steven James Bernstein indicates that he confirmed the respondent's alibi on December 17, 1974. (T. 647, 649, 652, 667, 668).

[7] Petitioner's Appendix A, p. 8a, footnotes 9, 10, 11.

[8] Testimony of Judge Wayne Olson, T. 754-784.

[9] Testimony of Kent Brody, T. 580-601.

When the alibi was confirmed by the respondent's counsel, the information was presented to another assistant state's attorney who, after further investigation, dismissed all criminal charges against the respondent on the 113th day of his incarceration.[10]

The respondent initiated his civil rights action on July 14, 1976, which claimed that the petitioner failed to investigate, in a reasonable manner, a plausible alibi given by a person in custody and that the petitioner misrepresented to the prosecuting attorneys that either no alibi was given or that the alibi was checked out and found to be false and that the conflicting identifications by the victims had been resolved, all of which were false and established the petitioner's lack of good faith. The petitioner's conduct resulted in respondent's confinement for 113 days, in deprivation of his constitutional rights.

In Whitley I, the jury awarded the respondent Forty Thousand ($40,000.00) Dollars in damages. The Seventh Circuit reversed this award due to the District Court's *sua sponte* oral instruction to the jury regarding Illinois preliminary hearing procedure. (613 F. 2d 682, 686.)

In Whitley II, the jury awarded the respondent Sixty Thousand ($60,000.00) Dollars in damages, and the District Court awarded fees, under Section 1988, in the amount of Ten Thousand ($10,000.00) Dollars.

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[10] Respondent's counsel advised Assistant State's Attorney George Pappas of the alibi and alibi witnesses, on January 2, 1975 (T. 677), who formally moved to dismiss all charges against the respondent on February 3, 1975. (T. 688).

REASONS WHY THE WRIT SHOULD BE DENIED

The Doctrine of Collateral Estoppel Cannot Be Applied to the Facts of This Case, Since the Respondent Did Not Have a Full and Fair Opportunity to Litigate His Section 1983 Suit in the State Court Preliminary Hearing.

The petitioner asserts that the Seventh Circuit's opinion repudiated this Court's decision in *Allen* v. *McCurry*, 449 U. S. 90 (1980).[11]

An analysis of the Seventh Circuit's opinion reveals that it followed the *Allen* decision and held the rule of collateral estoppel inapplicable, based on the evidence.

The Seventh Circuit set forth the criteria of the doctrine of collateral estoppel:

1. whether the issue sought to be concluded is the same as that involved in the prior action;
2. was litigated in the prior action;
3. was in fact judicially determined in the prior action; and
4. whether the judgment in the prior action was dependent upon the determination made of the issue.

(Petitioner's Appendix A, p. 5a, quoting 1B Moore's Federal Practice, paragraph O. 443(1)(1965)).

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[11] Petitioner also attempts to raise an issue (Question Presented) which is incorrect. The probable cause finding, at the preliminary hearing, did not mean probable cause for the *arrest*, but to believe an offense had been committed by the defendant. (See: Petitioner's Appendix A, pp. 5a and 10a, footnote 13 and Statutes Involved (Petition, p. 3). Also, the respondent's Section 1983 claim was based on petitioner's failure to investigate, in a reasonable fashion, a plausible alibi and petitioner's misrepresentations to the prosecuting authorities that petitioner checked the alibi and found it to be false.

The Seventh Circuit stated that only if *all* of the above criteria were met, could there be issue preclusion.

The petitioner's brief evades the *ratio decidendi* of the Seventh Circuit's opinion, claiming that the Seventh Circuit's opinion repudiates the holding in *Allen*. An additional aspect of this handiwork consists of the petitioner's sanitized version of the facts as set forth in the Petitioner's "Statement of the Case".

Well-knowing that the petitioner's conduct and misrepresentations are the linchpin of the Seventh Circuit's decision, the petitioner carefully ignores any discussion of the facts. The Seventh Circuit found that the respondent's Section 1983 suit challenged the "integrity" and not the sufficiency of the evidence at the preliminary hearing. In effect, there was no relitigation of the probable cause finding. The respondent's Section 1983 suit claimed that the petitioner's bad faith *vitiated* the finding at the preliminary hearing. (Petitioner's Appendix A, p. 6a.)

The Seventh Circuit's opinion, in Whitley II, only touched upon some of the evidence adduced at the trial. For a more detailed discussion of the facts, the Seventh Circuit referenced its opinion to *Whitley* v. *Seibel*, 613 F. 2d 682 (7th Cir. 1980) (Whitley I).

In dealing with the issue of collateral estoppel and the *Allen* decision, the Seventh Circuit carefully analyzed the criteria for the applicability of the rule and examined the criteria necessarily in reference to the *facts* adduced at the trial.

The first criterion of the rule examined was the "identity of issues" involved in the two proceedings (preliminary hearing and Section 1983 suit).

The preliminary hearing, conducted by the state judge, decided only whether there was probable cause to believe that the offenses had been committed by the respondent. By

contrast, the respondent's Section 1983 suit raised two specific derelictions (issues) relating to the arresting officer (petitioner):

1. failure to investigate in a reasonable fashion a plausible alibi given by the respondent, who was in custody; and

2. the petitioner's misrepresentations to the assistant state's attorneys that petitioner had checked the alibi and found it to be false. (Petitioner's Appendix A, pp. 5a, 6a.)

The Seventh Circuit, in accordance with the *Allen* opinion, recognized that there would be an identity of issues between a preliminary hearing and a Section 1983 suit, when the civil action solely raises the issue of the "legality of the arrest". Here, the respondent's suit did not seek to relitigate the "veracity" of the state's case at the hearing, but challenged the "integrity" of the preliminary hearing evidence, as tainted by the subsequently revealed conduct and misrepresentations of the petitioner.

The Seventh Circuit reasoned that petitioner's conduct, *viz.* subparagraphs 1 and 2, above, was highly significant in reaching its decision on the issue of collateral estoppel because:

a. the respondent's arrest was approved due to the petitioner's misrepresentations; and

b. the petitioner's misrepresentations were "instrumental" in the state's case at the preliminary hearing.

The Seventh Circuit found that the issues involved in the respondent's Section 1983 suit were totally distinct from the issue involved in the preliminary hearing and, therefore, the first criterion of the collateral estoppel rule was unsatisfied.

The second criterion of the collateral estoppel rule, litigation in the prior action, was also fully considered in the Seventh Circuit's opinion. The petitioner argued that the respondent's failure to raise the alibi at the preliminary hearing amounted to a "waiver" of the alibi. Although the Seventh Circuit recognized that there was authority to the effect that failure to raise an issue is tantamount to waiver, the Court found that there was no waiver of the respondent's alibi. In order for the waiver to have collateral estoppel effect, there must be " '. . . reason to believe that the failure to litigate the matter in fact was a recognition of the opposing claim. *Palma* v. *Powers*, 295 F. Supp. 924, 936 (N. D. Ill. 1969).' " (Petitioner's Appendix A, p. 7a) The Seventh Circuit found that "Whitley's silence" at the preliminary hearing could not be equated with "recognition of the opposing claim" because

a. respondent knew he was innocent, gave the arresting officer (petitioner) the information (insurance adjuster's business card) to confirm his alibi (innocence), yet he was arrested and imprisoned;

b. the preliminary hearing procedure in Illinois, effective on the date of the respondent's criminal prosecution, was a relatively "summary proceeding, designed only to reach an interim decision";

c. an accused has no right to discovery at the preliminary hearing, therefore, the respondent could not obtain production of the petitioner's police reports and other officers' reports;

d. respondent could not appeal the finding of probable cause;

e. the preliminary hearing could be dispensed with and the prosecution could take the case "direct" to the grand jury for an indictment; and

f. the respondent did not have sufficient time to prepare his case, i.e. confirm the alibi, *via* witnesses who would be prepared to testify and withstand cross-examination.[12]

Because of the above reasons, the Seventh Circuit did not find any basis to conclude "that the failure to litigate the matter in fact was a recognition of the opposing claim."

The third criterion of the rule that the issue was, in fact, judicially determined in the prior action, also was not satisfied, in the opinion of the Seventh Circuit.

> Judge Olson had no occasion to consider Whitley's alibi or the quality of Seibel's investigation and reports. (Petitioner's Appendix A, p. 8a.)

Due to the circumstances of this case, the petitioner's conduct and misrepresentations were unknown at the time of the preliminary hearing and could not have been considered by the state court judge, therefore the issues pertaining to petitioner Seibel's investigation were not judicially determined in the prior action.

Finally, the Seventh Circuit held that the fourth criterion was also unmet. Realizing the nature and function of a preliminary hearing, the Seventh Circuit concluded that "... a variety of issues could be resolved in favor of the suspect without necessitating a finding of no probable cause." (Petitioner's Appendix A, p. 8a.) In short, the Court stated that it is impossible to ascertain whether a finding of probable cause necessarily depended on the determination of the issue.

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[12] The importance of confirming an alibi (witness) prior to presenting such evidence was readily apparent to the state judge (Judge Wayne Olson), the respondent's defense attorney (Steven Bernstein), and the Seventh Circuit. (Petitioner's Appendix A, p. 12a, fn. 18.)

At the conclusion of this discussion, the Seventh Circuit expressed doubt that collateral estoppel "... would ever be appropriate *solely* on the basis of a preliminary hearing ..." and emphasized "... that *it is certainly not appropriate on the facts of this case.*" (Petitioner's Appendix A, p. 9a.) (Emphasis supplied.)

The petitioner Seibel argues that this Court's opinion in *Allen* applies regardless whether the party has had an opportunity to "fully present their case to the state court". (Petitioner's Brief, p. 7.) The petitioner claims that such a distinction is "meaningless". The "distinctions" delineated in the Seventh Circuit's opinion are far from meaningless. Instead, those "distinctions" underscore the factual differences between *Allen* and the present case. In *Allen*, there was no hint that McCurry was not given a "full and fair opportunity" to litigate the issue (unreasonable search and seizure) in the state court action. In the present case, it cannot be overlooked that at the preliminary hearing, the petitioner's conduct, in most respects, engineered the outcome of the hearing. As noted in the Seventh Circuit's opinion, Seibel's misrepresentations were "instrumental in the state's case" at the hearing. (Petitioner's Appendix A, p. 6a, footnote 5.)

The petitioner's suggestion that *Allen* was disregarded or "denuded" by the Seventh Circuit's opinion, lacks merit. Petitioner seeks to extend the holding in *Allen* to any state court proceeding regardless of the nature of the proceeding or the scope of the hearing. Under the petitioner's analysis of *Allen*, as long as there was a state court proceeding, collateral estoppel applies. Petitioner totally ignores the import of the Seventh Circuit's statement that collateral estoppel was "certainly not appropriate on the facts of this case". (Petitioner's Appendix A, p. 9a.) Petitioner's conduct, partly consisting of misrepresentations to three assistant state's attorneys and falsification of official police reports, totally "vitiated" the finding at the preliminary hearing.

In *Whitley I*, the Seventh Circuit evaluated the impact of the petitioner's conduct:

> "It appears from the testimony that had that assistant state's attorney been fully and honestly briefed by the defendant (petitioner) and had not been misled, it is very doubtful that the arrest would have been authorized." 613 F. 2d at 686.

That reference pertains to petitioner's misrepresentations to the prosecutor to obtain retroactive authorization for respondent's arrest. Petitioner's "conduct" continued through the preliminary hearing, where he again misrepresented the facts to yet another prosecutor, and a finding of probable cause was rendered.

Clearly, the facts of this case illustrate that the respondent was not given a "full and fair opportunity" to litigate the issues in his Section 1983 suit, in the prior state court proceeding, and could not have, due to the petitioner's conduct and the nature of the hearing involved.

The Seventh Circuit clearly recognized the shortcomings of the preliminary hearing versus an evidentiary hearing on a motion to suppress, in terms of litigation of Section 1983 issues. (See: Petitioner's Appendix A, p. 9a, footnote 12.)

To accept the petitioner's argument that collateral estoppel applies in this case, one would be required to ignore totally the petitioner's conduct and false representations that precipitated the respondent's arrest and the finding of probable cause.

Clearly, the Seventh Circuit followed the *Allen* decision and closely examined the impact of the petitioner's conduct and misrepresentations on the state court determination, as well as the nature of that process (the state court preliminary hearing), concluding that the respondent was not afforded "a full and fair opportunity" to litigate his Section 1983 claim.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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